

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1119

To be argued by:

GEORGE SHEINBERG, ESQ.

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PA'S -

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1119

UNITED STATES OF AMERICA,
Appellee,

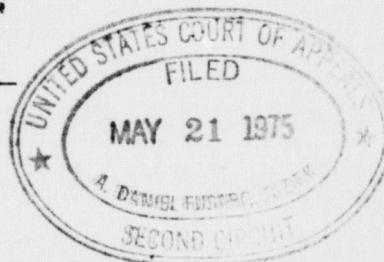
against
JOSE J. URIBE,
Appellant.

On Appeal From The United States District Court
For the Eastern District of New York.

BRIEF FOR APPELLANT

Attorney for Appellant
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APPELLANT'S BRIEF

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PO INT I

REFERENCES TO THE PROPOSED SALES
OF NARCOTICS AND MACHINE GUNS
SHOULD NOT HAVE BEEN ADMITTED
INTO EVIDENCE SINCE THEIR
PROBATIVE VALUE WAS FAR OUTWEIGHTED
BY THEIR PREJUDICIAL EFFECT. 9-17

CONCLUSION

THE JUDGEMENT OF CONVICTION SHOULD
BE REVERSED AND THE CASE REMANDED
FOR TRIAL WITH INSTRUCTIONS TO
EXCLUDE ALL REFERENCES TO THE
PROPOSED SALE OF NARCOTICS AND
MACHINE GUNS. 17

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"A"

PRELIMINARY STATEMENT

THIS IS AN APPEAL FROM THE CONVICTION OF THE APPELLANT
ON OCTOBER 2, 1974 AFTER TRIAL BY JURY AT THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, HON.
THOMAS C. PLATT, U.S.D.J., PRESIDING, OF THE CRIME OF KNOWINGLY
SELLING THREE PISTOLS AND ONE REVOLVER WHICH WERE STOLEN WHILE
IN INTERSTATE COMMERCE, UNDER A ONE COUNT INDICTMENT CHARGING
THAT, "ON OR ABOUT THE 26TH DAY OF FEBRUARY 1973 WITHIN THE
EASTERN DISTRICT OF NEW YORK, THE DEFENDANT JOSE JAHIR URIBE,
DID KNOWINGLY SELL AND DISPOSE OF STOLEN FIREARMS, THAT IS,
THREE (PISTOLS), AND ONE (REVOLVER), WHICH FIREARMS WHEN STOLEN
WERE MOVING AS, WERE PART OF, AND CONSTITUTED INTERSTATE
COMMERCE..., THE DEFENDANT JOSE JAHIR URIBE KNOWING AND HAVING
REASONABLE CAUSE TO BELIEVE THAT SAID FIREARMS WERE STOLEN.
(TITLE 18, UNITED STATES CODE, 1922(j) AND 924(a).)"

THIS APPEAL IS BASED UPON APPELLANT'S CONTENTION THAT
THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE GOVERNMENT
TO INTRODUCE INTO EVIDENCE STATEMENTS BY THE APPELLANT CONCERNING
THE PROPOSED SALE OF DRUGS AND MACHINE GUNS, CRIMES NOT CHARGED
IN THE INDICTMENT, EVIDENCE OF WHICH HAD LITTLE RELEVANCE TO THE
CRIME CHARGED BUT WHICH WAS HIGHLY PREJUDICIAL.

PRIOR TO TRIAL, APPELLANT MOVED TO SUPPRESS A TAPE
RECORDING MADE BY THE GOVERNMENT AT THE TIME OF THE ALLEGED
SALE, THE TRANSCRIPT OF THIS TAPE, AND A CONFESSION MADE BY
THE APPELLANT AFTER HIS ARREST, ON THE GROUNDS THAT THE TAPE
WERE INAUDIBLE, THE TRANSCRIPT HAD BEEN PREPARED WITH THE AID

OF A GOVERNMENT AGENT, AND THE CONFESSION HAD BEEN MADE WITHOUT A KNOWING WAIVER OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

A SUPPRESSION HEARING WAS HELD BY JUDGE NEAHER ON AUGUST 26, 1974. SAID MOTION WAS DENIED IN ALL RESPECTS.

THE TAPES AND THE TRANSCRIPTION THEREOF CONTAINED NUMEROUS REFERENCES TO THE PROPOSED SALE OF NARCOTICS AND MACHINE GUNS. THE CONFESSION ALSO REFERRED TO DRUGS AS WELL AS THE ALLEGED SALE OF FIREARMS.

IN THE MEMORANDUM OF LAW SUBMITTED BY THE GOVERNMENT IN SUPPORT OF THE ADMISSIBILITY OF THE TRANSCRIPT OF THE TAPES AS EVIDENCE, THE GOVERNMENT ALSO SUBMITTED SUPPORT FOR ITS INTENTION TO OFFER TESTIMONY CONCERNING NEGOTIATIONS FOR THE SALE OF NARCOTICS AND MACHINE GUNS.

IMMEDIATELY PRIOR TO THE TRIAL, THE APPELLANT MOVED TO SUPPRESS ANY REFERENCES TO NARCOTICS AND MACHINE GUNS AT THE TRIAL. JUDGE PLATT RULED THAT WHILE HE WOULD NOT ALLOW TESTIMONY AS TO NEGOTIATIONS FOR THE SALE OF NARCOTICS, HE WOULD ALLOW TESTIMONY TO EXPLAIN REFERENCES TO MACHINE GUNS WHICH APPEARED IN THE TAPE RECORDING AND THE TRANSCRIPT OF THE TAPE RECORDING. (TRIAL, 26) HOWEVER, THE ENTIRE TAPE RECORDING, CONTAINING REFERENCES TO BOTH DRUGS AND MACHINE GUNS, WOULD BE ADMITTED INTO EVIDENCE TOGETHER WITH THE TRANSCRIPT THEREOF. THIS WAS DONE DESPITE REPEATED OBJECTIONS. (TRIAL, 132)

THE EFFECT OF THE RULING WAS TO ALLOW ALL REFERENCES TO THE SALE OF MACHINE GUNS, IN DIRECT TESTIMONY AND THE TAPE AND TRANSCRIPT, AS WELL AS REFERENCES TO THE SALE OF NARCOTICS IN THE TAPE RECORDING AND TRANSCRIPT.

IT IS THE CONTENTION OF THE APPELLANT THAT THE ADMISSION OF SUCH TESTIMONY AND EVIDENCE WAS HIGHLY PREJUDICIAL TO THE DEFENDANT, WHILE HAVING ONLY SLIGHT RELEVANCE TO THE CRIME CHARGED. THE ADMISSION OF SUCH PREJUDICIAL MATTER DENIED THE DEFENDANT A FAIR TRIAL AND THUS CONSTITUTES REVERSIBLE ERROR.

SUMMARY OF PROOF

GERMAN AUGUSTO SANCHEZ, A CITIZEN OF COLUMBIA RESIDING IN THE UNITED STATES, TESTIFIED THAT SOME TIME AFTER 1971 HE BECAME AN UNDERCOVER AGENT FOR THE U.S. BUREAU OF CUSTOMS AND THE U.S. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS. IN JANUARY, 1973, SANCHEZ HAD INTRODUCED SPECIAL AGENT ANTONIO BOCCHICHIO OF THE U.S. BUREAU OF CUSTOMS TO THE DEFENDANT AS ONE OF THE BOSSSES OF THE ITALIAN MAFIA. ON FEBRUARY 1, 1973, SANCHEZ HAD AN APPOINTMENT TO MEET ONE ALVARIO HERNANDEZ AT THE TAILOR SHOP OF THE APPELLANT LOCATED AT ROOSEVELT AVENUE, BETWEEN 88TH AND 89TH STREETS, JACKSON HEIGHTS, NEW YORK. SANCHEZ ARRIVED AT THE TAILOR SHOP AT APPROXIMATELY 6:30 P.M. HERNANDEZ ARRIVED APPROXIMATELY ONE HALF HOUR LATER, AND ASKED URIBE, "WHERE IS ?" URIBE WENT TO THE BACK OF THE SHOP AND RETURNED WITH A PAPER BAG. URIBE TOOK A BOX FROM THE BAG AND REMOVED A .38 YAMA PISTOL FROM THE BOX. SANCHEZ ASKED IF URIBE WOULD SELL THE PISTOL TO HIM. URIBE ANSWERED, "DON'T WORRY, I CAN GET ONE FOR YOU. I HAVE CONNECTIONS, A CUBAN AND COLUMBIAN GUY, AND THEY HAVE FIREARMS, AND ALSO SOME MACHINE GUNS FOR SALE...." SANCHEZ SAID THAT ANTONIO MIGHT BE INTERESTED IN BUYING SOME MACHINE GUNS.

ON FEBRUARY 24, 1973 AT APPROXIMATELY 1:30 P.M., SANCHEZ WENT TO THE TAILOR SHOP ASKING FOR HERNANDEZ. URIBE WAS IN THE COMPANY OF TWO MEN. THEY WERE INTRODUCED TO SANCHEZ AS GILBERTO AND ALBERTO. URIBE SAID HE HAD NOT SEEN HERNANDEZ FOR SEVERAL DAYS AND, AS SANCHEZ WAS LEAVING, ASKED SANCHEZ WHETHER ANTONIO WOULD BE INTERESTED IN BUYING A .38 STERLING ARM. URIBE GAVE THE PISTOL TO SANCHEZ TO SHOW TO ANTONIO. ALBERTO THEN SHOWED SANCHEZ A .22 RUGER REVOLVER AND ASKED

WHETHER ANTONIO WOULD BE INTERESTED IN BUYING IT. ALBERTO EXPLAINED THAT HE HAD FOUR MORE. URIBE ASKED THAT SANCHEZ LET HIM KNOW THE ANSWER ON MONDAY. SANCHEZ SAID HE WOULD CALL URIBE AT 1:00 P.M. ON MONDAY.

AFTER LEAVING, SANCHEZ MET BOCCHICHO AND REPORTED THE CONVERSATIONS AND GAVE BOCCHICHO THE .38 STERLING ARM.

THE FOLLOWING MONDAY, FEBRUARY 26, 1973, URIBE CALLED SANCHEZ AT 2:00 P.M. SANCHEZ EXPLAINED THAT HE HAD NOT RECEIVED AN ANSWER FROM ANTONIO. SANCHEZ THEN CALLED BOCCHICHO. URIBE THEN CALLED SANCHEZ EXPLAINING THAT ANTONIO WANTED TO BUY THE GUNS AND THAT SANCHEZ WOULD BE AT THE TAILOR SHOP AT ABOUT 4:00 P.M. SANCHEZ ARRIVED AT THE TAILOR SHOP AT ABOUT 4:10 P.M. BUT THE SHOP WAS CLOSED. MOMENTS LATER, ALBERTO, GILBERTO, AND URIBE ARRIVED. URIBE OPENED THE SHOP. ALBERTO GAVE URIBE A BAG CONTAINING A .38 STERLING ARM AND EXPLAINED THAT THE GUN HAD A PART MISSING BUT THAT THE PART WAS IN THE BOX. ALBERTO LEFT. SANCHEZ, URIBE, AND GILBERTO THEN DROVE TO 37TH AVENUE AND 90TH STREET. GILBERTO WENT INTO THE APARTMENT HOUSE ON THE CORNER AND RETURNED IN FIVE MINUTES WITH A PAPER BAG WHICH HE GAVE TO URIBE. URIBE REMOVED THE BAG AND OPENED THE BOX INSIDE REVEALING A .22 RUGER. URIBE THEN DROVE TO THE PARKING LOT OF JACK-IN-THE-BOX AT ASTORIA BOULEVARD BETWEEN 87TH AND 88TH STREETS. HE PARKED THE CAR AND SANCHEZ AND URIBE WALKED TO AGENT BOCCHICHO'S CAR WHICH WAS PARKED ON THE STREET OPPOSITE THE PARKING LOT.

URIBE CARRIED THE BAG CONTAINING THE FIREARMS. HE ENTERED BOCCHICHO'S CAR AND SAT IN THE FRONT SEAT WITH BOCCHICHO. SANCHEZ SAT IN THE BACK SEAT. URIBE OFFERED THE FOUR GUNS TO

BOCCHICHO AT \$150 EACH. BOCCHICHO OFFERED \$120 EACH WHICH URIBE ACCEPTED. BOCCHICHO PAID URIBE \$600 FOR FIVE GUNS, INCLUDING THE FOUR WHICH URIBE HAD BROUGHT AND THE FIFTH WHICH SANCHEZ HAD RECEIVED THE STURDAY BEFORE. SANCHEZ AND URIBE THEN LEFT THE CAR AND RETURNED TO THE PARKING LOT. SANCHEZ DROVE URIBE BACK TO THE TAILOR SHOP. ON THE WAY URIBE GAVE SANCHEZ \$75 FOR HIS PARTICIPATION.

ON CROSS EXAMINATION, SANCHEZ STATED THAT MOST OF WHAT URIBE SAID WAS IN SPANISH WHICH HE TRANSLATED TO BOCCHICHO, THAT HE WAS UNEMPLOYED AND DID NOT REMEMBER THE NAMES OF ANY EMPLOYER SINCE JUNE, 1973, THAT HE WAS PAID FOR HIS UNDERCOVER WORK, BUT THAT HE WAS NOT PAID FOR CONVICTIONS, THAT HE WAS EXPelled FROM COLUMBIA, THAT HIS RESIDENCE IN THE UNITED STATES WAS AT THE PLEASURE OF THE UNITED STATES GOVERNMENT, THAT HE HAD BEEN A POLICE OFFICER IN COLUMBIA, THAT HE HAD SPENT TWO TO THREE YEARS IN JAIL AS AN UNDERCOVER AGENT.

ALBERT B. BOYNE WAS QUALIFIED AS AN EXPERT INTERPRETER AND TESTIFIED AS TO HIS PREPARATION OF A TRANSLATION AND TRANSCRIPT OF A TAPE GIVEN TO HIM BY AGENT BOCCHICHO. ON CROSS EXAMINATION, BOYNE ADMITTED THAT CERTAIN PARTS OF THE TAPE WERE INAUDIBLE AND THAT HE USED THE ASSISTANCE OF AGENT BOCCHICHO FOR CLARIFICATION.

AGENT ANTHONY BOCCHICHO TESTIFIED THAT PRIOR TO JULY, 1973, HE WAS A SPECIAL AGENT WITH THE BUREAU OF CUSTOMS. SANCHEZ WAS A GOVERNMENT INFORMANT WHO INTRODUCED HIM TO URIBE ON JANUARY 3, 1973. ON FEBRUARY 4, 1973, SANCHEZ BROUGHT BOCCHICHO A .38 STERLING ARMS PISTOL AND TOLD HIM THAT THERE WERE FOUR OTHERS FOR SALE. BOCCHICHO TOLD SANCHEZ THAT HE WOULD LET HIM KNOW ON MONDAY WHETHER THE BUREAU OF ALCOHOL, TOBACCO, TAX AND FIREARMS WAS INTERESTED IN PURCHASING THEM.

AT APPROXIMATELY 2:00 P.M. ON MONDAY, FEBRUARY 26, 1973, BOCCHICHO RECEIVED A CALL FROM SANCHEZ. HE TOLD SANCHEZ THAT HE WOULD CALL HIM BACK IN A FEW MINUTES. HE THEN CALLED AGENT KERN OF THE BUREAU OF ALCOHOL, TOBACCO, TAX AND FIREARMS, AFTER WHICH HE CALLED SANCHEZ TO TELL HIM THAT HE WOULD PURCHASE THE FIREARMS AND TO SET UP A MEETING. THE MEETING WAS TO BE BEHIND JACK-IN-THE-BOX ON 25TH AVENUE BETWEEN 87TH AND 88TH STREETS.

PRIOR TO THE MEETING, BOCCHICHO DIRECTED AGENTS TO SERVEIL THE AREA AND TO TAKE A CAMERA AND PHOTOGRAPH IT. HE ALSO PUT ON A KEL TRANSMITTER WHICH HE CHECKED BEFORE LEAVING FOR THE MEETING. HE INSTRUCTED THE AGENTS TO RECORD THE CONVERSATION TRANSMITTED BY THE DEVICE. BOCCHICHO THEN PROCEEDED TO THE MEETING PLACE IN AN UNDERCOVER VEHICLE.

BOCCHICHO ARRIVED AT THE MEETING PLACE AT APPROXIMATELY 4:00 P.M. AT ABOUT 4:30 P.M. HE OBSERVED THE CAR OWNED BY SANCHEZ PULLING INTO THE PARKING LOT OF JACK-IN-THE-BOX. SANCHEZ AND URIBE EXITED FROM THE VEHICLE AND WALKED TO HIS CAR. URIBE WAS CARRYING A PAPER BAG. URIBE GOT INTO THE FRONT SEAT AND SANCHEZ GOT INTO THE REAR SEAT. URIBE PLACED THE PAPER BAG BETWEEN HIM AND BOCCHICHO. AFTER GREETING EACH OTHER, BOCCHICHO EXAMINED THE BAG AND FOUND THREE .38 STERLING ARMS. SANCHEZ TOOK OUT A FOURTH GUN, A .22 RUGER. URIBE ASKED FOR \$120 FOR EACH OF THE STERLING ARMS AND \$150 FOR THE RUGER. BOCCHICHO OFFERED \$120 FOR EACH. URIBE ACCEPTED AND ASKED FOR \$600 INCLUDING THE GUN SANCHEZ HAD ALREADY GIVEN HIM. BOCCHICHO THEN PAID URIBE THE \$600.

THE THREE STERLING ARMS PISTOLS AND THE RUGER REVOLVER
WERE RECEIVED IN EVIDENCE.

BOCCHICHO THEN TESTIFIED AS TO THE ACCURACY OF
SEVEN PHOTOGRAPHS SHOWING THE SEQUENCE OF EVENTS FROM
SANCHEZ AND URIBE EXITING SANCHEZ'S AUTOMOBILE THROUGH THEIR
RETURN TO SANCHEZ'S CAR. THE PHOTOGRAPHS WERE RECEIVED
IN EVIDENCE.

BOCCHICHO THEN IDENTIFIED THE TAPE RECORDING OF
THE CONVERSTION IN HIS AUTOMOBILE. THE TAPE AND A TRANSCRIPT
CONTAINING A TRANSLATION WAS RECEIVED IN EVIDENCE. THE TAPE
WAS THEN PLAYED FOR THE JURY. EACH MEMBER OF THE JURY WAS GIVEN
A COPY OF THE TRANSCRIPT TO FOLLOW THE TAPE CONVERSATION.

BOCCHICHO THEN TESTIFIED THAT HE SAW URIBE AT
CUSTOMS HEADQUARTERS AT 201 VARICK STREET AT A LITTLE AFTER
9:00 P.M. ON THE EVENING OF MARCH 2, 1973, SHORTLY AFTER
URIBE'S ARREST BY AGENTS OF THE BUREAU OF CUSTOMS. BOCCHICHO
TESTIFIED THAT AFTER URIBE HAD BEEN ADVISED OF HIS RIGHTS, HE
SAID TO URIBE, "DON'T TELL ME YOU DIDN'T SELL ME THE GUNS," TO WHICH
URIBE ANSWERED, "THE GUNS, YES, THE OTHERS, NO."

THE GOVERNMENT THEN READ INTO THE RECORD A STIPULATION
TO THE EFFECT THAT THE GUNS WERE STOLEN FROM INTERSTATE COMMERCE,
AND WERE OPERABLE.

THE GOVERNMENT THEN RESTED.

THE DEFENDANT RESTED WITHOUT CALLING ANY WITNESSES.

THE JURY DELIBERATED FROM 12:20 TO 12:30 AND FROM
1:30 TO 2:00 P.M. AT WHICH TIME THE JURY ANNOUNCED THAT IT HAD
FOUND THE DEFENDANT GUILTY AS CHARGED.

POINT 1

REFERENCES TO THE PROPOSED SALES OF NARCOTICS AND MACHINE GUNS SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE SINCE THEIR PROBATIVE VALUE WAS FAR OUTWEIGHED BY THEIR PREJUDICIAL EFFECT.

THERE ARE NUMEROUS REFERENCES TO THE PROPOSED SALE OF MACHINE GUNS AND NARCOTICS IN THE RECORD OF THIS TRIAL. SANCHEZ TESTIFIED THAT URIBE OFFERED TO SELL MACHINE GUNS TO SANCHEZ.

DON'T WORRY. I CAN GET ONE FOR YOU. I HAVE CONNECTIONS, A CUBAN AND COLUMBIAN GUY, AND THEY HAVE FIREARMS, AND ALSO SOME MACHINE GUNS FOR SALE,....

TRIAL, 17.

SANCHEZ SUGGESTED THE PURCHASE OF MACHINE GUNS.

WHAT HAPPENED WITH THE MACHINE GUNS FOR ANTONIO? HE IS INTERESTED IN THE MACHINE GUNS. THEY NEED IT FOR THE MAFIA BUSINESS. AND HE SAY, "NEXT WEEK, APPROXIMATELY, BECAUSE WE DON'T KNOW. WE HAD IT STOLE."

TRIAL, 22.

THE GOVERNMENT THEN STRESSED THE OFFER TO SELL MACHINE GUNS BY REPEATED QUESTIONS TO SANCHEZ CONCERNING THE PROPOSED SALE WHICH ARE ALLEGED TO HAVE BEEN MADE AT THE TIME OF THE ALLEGED SALE OF THE PISTOLS AND REVOLVER.

- A. AFTER THAT, MR. BOCCHICHO ASKED TO MR. URIBE, "WHAT HAPPENED WITH THE SUB-MACHINE GUNS?" AND HE SAYS, "FOR NEXT WEEK."
- Q. WHO SAID, "FOR NEXT WEEK"?
- A. MR. URIBE ANSWERED TO MR. BOCCHICHO, "FOR NEXT WEEK." MR. BOCCHICHO SAY, "WHAT HAPPENED WITH THE SUB-MACHINE GUNS," AND HE SAY HE HAVE FOR NEXT WEEK.
- Q. NOW, BE SURE, MR. SANCHEZ, TO TELL US WHO IS SPEAKING.
- MR. BOCCHICHO SAID, "WHAT HAPPENED TO THE MACHINE GUNS,..."

A. AND MR. URIBE ANSWERED TO MR. BOCCHICHO, "FOR NEXT WEEK."

MR. BOCCHICHO ASKED TO MR. URIBE, HOW MUCH HE CHARGE FOR THOSE MACHINE GUNS, AND HE SAY, \$400."

Q. MR. URIBE SAID --

A. \$400, AND HE ASKED TO MR. BOCCHICHO, TO GIVE MONEY IN ADVANCE FOR THE MACHINE GUN.

Q. MR. URIBE ASKED --

A. MR. URIBE ASKED MR. BOCCHICHO TO GIVE HIM MONEY IN ADVANCE FOR THE MACHINE GUN, AND MR. BOCCHICHO SAID HE DON'T GIVE MONEY, BUT AFTER HE SEE THE MACHINE GUNS -- LIKE WHAT HAPPENED WITH THE GUNS HE HAVE RIGHT NOW -- HE PAY. HE PAY WHEN HE HAVE THE MACHINE GUN IN HIS HANDS.

TRIAL, 39, 40.

AGENT BOCCHICHO ALSO TESTIFIED IN REGARD TO THE PROPOSED SALE OF MACHINE GUNS.

A. THEN I TURNED AND ASKED HIM ABOUT THE MACHINE GUNS. I SAID, "HOW MUCH FOR THE MACHINE GUNS?" AND MR. URIBE ANSWERED ME IN ENGLISH, "\$400." AFTER THAT MR. SANCHEZ -- THEN I SAID THEY'D -- I WANTED THEM GOOD QUALITY. I DIDN'T WANT ANY BAD QUALITY MACHINE GUNS AND HE SAID, MR. SANCHEZ SAID TO ME, "THEY'RE NEW. THEY'RE BRAND NEW." AND MR. URIBE SAID IN ENGLISH, "NO, THEY'RE NOT NEW." AND I TOLD HIM THAT I DIDN'T WANT ANY INFERIOR QUALITY WEAPONS. I DIDN'T WANT ANY POOR QUALITY MACHINE GUNS AND I REITERATED THAT...

Q. WAS THERE ANY OTHER CONVERSATION RELEVANT TO -- I BELIEVE YOU MENTIONED MACHINE GUNS. WAS THERE ANY OTHER CONVERSATION RELEVANT TO MACHINE GUNS?

A. YES. I ASKED HIM WHEN I WAS GOING TO GET THE MACHINE GUNS AND SOME OTHER THINGS AND HE TOLD ME THAT THE MACHINE GUNS I WOULD BE GETTING LATER ON THAT WEEK. HE DIDN'T SAY MACHINE GUNS. HE SAID OTHER THINGS. I -- HE SAID I WOULD BE GETTING OTHER THINGS THIS WEEK AND SOME OTHER THINGS THE FOLLOWING WEEK.

Q. WHAT IF ANY DISCUSSION WAS THERE RELEVANT TO PAYMENT FOR THESE MACHINE GUNS?

A. HE TOLD ME THEY WERE \$400 EACH. THEN HE ASKED ME FOR AN ADVANCE. HE -- MR. SANCHEZ TOLD ME.

Q. WHO ASKED FOR THE ADVANCE?

A. MR. SANCHEZ TOLD ME THAT MR. URIBE ASKED ME -- I WOULD LIKE AN ADVANCE ON THE MACHINE GUNS. AND I TOLD HIM I WOULDN'T GIVE HIM ANY ADVANCE UNTIL HE DELIVERED THE MACHINE GUNS. I TOLD HIM WHEN I SAW THE MACHINE GUNS I'D PAY HIM FOR THE MACHINE GUNS, AND THAT'S THE WAY WE DID BUSINESS.

TRIAL, 114, 115.

IN ADDITION, THE TRANSCRIPT OF THE TAPE RECORDING
CONTAINED SEVERAL REFERENCES TO MACHINE GUNS.

BOCCHICHIO: HOW MUCH FOR THE OTHERS? HOW MUCH
FOR THE MACHINE GUN?
URIBE: EH...FOUR HUNDRED.
SANCHEZ: IS FOUR HUNDRED.
URIBE: (INAUDIBLE)
BOCCHICHIO: WHAT KIND?
SANCHEZ: HE DON'T KNOW.
URIBE: I DON'T KNOW, I GUESS THAT,
WHAT MACHINE BRAND...
SANCHEZ: WELL, HOWEVER IT IS THEY COME, BROTHER.
BOCCHICHIO: IN GOOD CONDITION?
URIBE: VERY WELL.
SANCHEZ: NEW ONE.
BOCCHICHIO: NO SHIT! NO. NO. SHIT. IT'S GOT TO BE,
NO.
URIBE: NOT A NEW ONE.
BOCCHICHIO: ALRIGHT.
URIBE: NO NEW ONE.

URIBE: DO YOU THINK THAT HE CAN ADVANCE US
SOME MONEY FOR THE MACHINE GUNS?
SANCHEZ: TONY, HE SAYS IF YOU CAN GIVE HIM A LITTLE
FOR THE MACHINE GUN?
BOCCHICHIO: WHEN YOU DELIVER THE MACHINE GUNS, I
WILL GIVE YOU THE MONEY.
URIBE: OKAY.

TRANSCRIPT, 3, 4, 5.

FURTHERMORE, DESPITE THE COURT'S RULING AS TO TESTIMONY
REGARDING NARCOTICS, THE TAPE RECORDING AND TRANSCRIPT CONTAINED
REFERENCES TO WHAT COULD ONLY BE CONSIDERED AS NEGOTIATIONS FOR
THE SALE OF NARCOTICS.

BOCCHICHIO: ALRIGHT, WELL, WHAT ABOUT THE OTHER STUFF?,
THE STUFF WE TALKED ABOUT LONG AGO.
SANCHEZ: OH, HE IS TALKING ABOUT THE SAMPLE...
URIBE: OH, THE SAMPLE, TELL HIM WE ARE ALREADY
WAITING FOR THE PERSON COMING FROM COLUMBIA.
SANCHEZ: HE IS WAITING FOR THE PERSON TO COME IN
FROM COLUMBIA. HE SAY ...
URIBE: HE IS COMING ALREADY. WE ARE WAITING FOR
DIAZ, IT IS ONLY A MATTER OF DAYS, OF DAYS.
ONLY A FEW DAYS.
SANCHEZ: ONLY FOR A FEW DAYS.

BOCCICHIO: YOU HAVE BEEN TELLING ME THAT ALL THE WHILE, A DAY, TWO DAYS, I TELL THE GUY I AM GOING TO SHOW HIM, I GOT THE SAMPLE AND...AH...THAT...AH...THAT'S THE THING, THE ONLY THING, I'M KEEPING THE GUY INTERESTED BECAUSE I TELL HIM I CAN GET HIM THIS AND ...AH...SOME OTHERS, CAUSE HE'S THE SAME GUY TAKES BOTH, YOU KNOW? HE SAYS HE HAS...THE OTHER GUY WAITING.

SANCHEZ: YES, WAITING, YES.

URIBE: THAT IS THE SAME GUY WHO IS GOING TO BUY...

SANCHEZ: THIS IS JUST, FOR...ER...AH...THERE...AH...

BOCCICHIO: I DON'T GIVE A SHIT ABOUT THIS, THIS IS JUST TO KEEP THEM HAPPY, YOU KNOW.

URIBE: HUM...

SANCHEZ: HE SAYS...

URIBE: KEEP THEM HAPPY.

TRANSCRIPT, 1, 2.

THE GOVERNMENT ACKNOWLEDGED THAT THESE REFERENCES ARE TO NEGOTIATIONS FOR THE SALE OF NARCOTICS AND MACHINE GUNS. (GOVERNMENT'S MEMORANDUM OF LAW, 5) HOWEVER, THE GOVERNMENT CONTENDS THAT THESE REFERENCES ARE NEVERTHELESS ADMISSIBLE UNDER THE GENERAL INCLUSIONARY RULE IN THE SECOND CIRCUIT WHICH PERMITS EVIDENCE OF OTHER CRIMES TO BE ADMITTED INTO EVIDENCE UNLESS IT IS OFFERED SOLELY FOR THE PURPOSE OF PROVING CRIMINAL CHARACTER. UNITED STATES V. DEATON, 381 F. 2d 117 (2ND CIR., 1967)

THE GOVERNMENT CONTENDS THAT SUCH EVIDENCE WAS NOT OFFERED SOLELY FOR THE PURPOSE OF PROVING CRIMINAL CHARACTER IN THAT THE EVIDENCE WAS RELEVANT (1) AS PART OF THE RES GESTAE TO PROVIDE COMPLETENESS AND TO AVOID "TRUNCATED EVIDENCE", (2) TO ESTABLISH THE INTENT OF THE DEFENDANT AND TO NEGATE ANY DEFENCE OF LACK OF KNOWLEDGE OR MISTAKE, AND (3) TO ESTABLISH THE DEFENDANT'S PRE-DISPOSITION TO COMMIT THE OFFENSE CHARGED WHERE ENTRAPMENT IS OFFERED AS A DEFENSE. (GOVERNMENT'S MEMORANDUM OF LAW, 6-10)

ONE CANNOT ARGUE WITH THESE GENERALIZATIONS ON THEIR FACE. HOWEVER, A MORE SEARCHING ANALYSIS REVEALS THAT THE ISSUE

IS NOT QUITE AS SIMPLE AS THE GOVERNMENT WOULD MAKE IT OUT TO BE.

THE APPELLANT DOES NOT DENY THE RELEVANCE OF THE EVIDENCE OF OTHER CRIMES. (HEARING, 4) HOWEVER, "ALTHOUGH RELEVANT, EVIDENCE MAY BE EXCLUDED IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE..." RULE 403 OF THE FEDERAL RULES OF EVIDENCE.

UNFAIR PREJUDICE IS DEFINED AS "AN UNDUE TENDENCY TO SUGGEST DECISION ON AN IMPROPER BASIS, COMMONLY, THOUGH NOT NECESSARILY, AN EMOTIONAL ONE." ADVISORY COMMITTEE'S NOTE TO RULE 403.

"SITUATIONS IN THIS AREA CALL FOR BALANCING THE PROBATIVE VALUE AND NEED FOR THE EVIDENCE AGAINST THE HARM LIKELY TO RESULT FROM ITS ADMISSION." Id.

THIS GENERAL POLICY OF EXCLUDING RELEVANT EVIDENCE BECAUSE OF UNFAIR PREJUDICE IS SPECIFICALLY APPLICABLE TO EVIDENCE OF OTHER CRIMES.

BECAUSE SUCH EVIDENCE IS GENERALLY RECOGNIZED TO HAVE POTENTIALITY FOR PREJUDICE, IT IS USUALLY EXCLUDED EXCEPT WHEN IT IS PARTICULARLY PROBATIVE IN SHOWING SUCH THINGS AS INTENT, AN ELEMENT IN THE CRIME, IDENTITY, A SYSTEM OF CRIMINAL ACTIVITY, OR WHEN THE DEFENDANT HAS RAISED THE ISSUE OF HIS CHARACTER, OR WHEN THE DEFENDANT HAS TESTIFIED AND THE STATE SEEKS TO IMPEACH HIS CREDIBILITY.

SPENCER V. STATE OF TEXAS, 385 U.S. 554, 560
87 S.Ct. 648, 652, 17 L.Ed.2d 606 (1967) CITED
IN UNITED STATES V. KNOHL, 379 F.2d 427 (2ND
CIR., 1967) AT 438 (CITATIONS OMITTED AND
EMPHASIS ADDED).

EVEN IN CASES IN WHICH THE EVIDENCE IS OFFERED
TO PROVE ONE OF THE ENUMERATED EXCEPTIONS TO
THE GENERAL RULE, ITS PROBATIVE VALUE MAY BE
VERY SLIGHT WHILE ITS PREJUDICIAL CHARACTER
MAY BE VERY STRONG. UNDER SUCH CIRCUMSTANCES
THE TRIAL JUDGE HAS A DUTY IN THE EXERCISE OF
HIS DISCRETION TO EXCLUDE IT.

UNITED STATES V. KNOHL, SUPRA AT 438, 439, CITING
SPENCER V. TEXAS, SUPRA AND UNITED STATES V. BYRD,
352 F.2D 570, 574 (2ND CIR., 1965)

ALTHOUGH THE SECOND CIRCUIT HAS ADOPTED THE INCLUSIONARY RULE, UNITED STATES V. DEATON, SUPRA, AND THE INCLUSIONARY RULE HAS ALSO BEEN ADOPTED BY THE FEDERAL RULES OF EVIDENCE, RULE 404 (B),

THIS IS LARGELEY A MATTER OF APPROACH OR EMPHASIS, ALTHOUGH THE (INCLUSIONARY RULE) WOULD RESULT IN A SOMEWHAT "BROADER RANGE OF ADMISSABILITY." WHICHEVER METHOD IS ADOPTED, THE TRIAL JUDGE IS REQUIRED, AS WITH ANY POTENTIALLY PREJUDICIAL EVIDENCE, TO BALANCE ALL THE RELEVANT FACTORS TO DETERMINE WHETHER THE PROBATIVE VALUE OF THE EVIDENCE OF OTHER CRIMES IS OUTWEIGHED BY ITS PREJUDICIAL CHARACTER.

UNITED STATES V. DEATON, SUPRA, AT 117. (CITATIONS OMITTED)

THE ADVISORY COMMITTEE'S NOTE TO RULE 404 (B) LIKEWISE STATES THAT, "THE DETERMINATION MUST BE MADE WHETHER THE DANGER OF UNDUE PREJUDICE OUTWEIGHS THE PROBATIVE VALUE OF THE EVIDENCE, IN VIEW OF THE AVAILABILITY OF OTHER MEANS OF PROOF AND OTHER FACTORS APPROPRIATE FOR MAKING DECISIONS OF THIS KIND UNDER RULE 403 (THE EXCLUSION OF RELEVANT EVIDENCE ON THE GROUND OF PREJUDICE).

THE PROBLEM IS NOT MERELY ONE OF PIGEON-HOLDING, BUT ONE OF BALANCING, ON THE ONE SIDE, THE ACTUAL NEED FOR OTHER-CRIMES-EVIDENCE IN THE LIGHT OF THE ISSUES AND THE OTHER EVIDENCE AVAILABLE TO THE PROSECUTION ... AND ON THE OTHER, THE DEGREE TO WHICH THE JURY WILL PROBABLY BE ROUSED TO OVERMASTERING HOSTILITY.

McCORMICK, EVIDENCE., ¶ 157, AT 332 (1954).

THE BALANCING TEST SEEKS SIMPLE ENOUGH: "PROBATIVE VALUE" IS WEIGHED AGAINST "TENDENCY TO PREJUDICE".

(HOWEVER) "PROBATIVE WORTH" CONSISTS OF MORE THAN LOGICAL RELEVANCY OR SHREDS OF THE SAME; IT CON-

SISTS OF MORE THAN INNATE "PERSUASIVENESS." NO MATTER HOW PERSUASIVE OF THE FACT IT IS SUPPOSED TO PROVE, OTHER CRIMES EVIDENCE HAS NO PROBATIVE WORTH IF THE FACT IS NOT SUBSTANTIALLY IN ISSUE... (EMPHASIS IN ORIGINAL)

ANOTHER DIFFICULTY IN THIS AREA IS THAT PROSECUTORS ARE MOST AWARE OF THE USEFULNESS OF OTHER CRIMES EVIDENCE IN SECURING CONVICTIONS, AND THE TEMPTATIONS TO INTRODUCE THIS EVIDENCE IN THE HOPE THAT IT WILL REGISTER THE DESIRED PREJUDICIAL EFFECT ARE UNDOUBTEDLY GREAT.

M.C. Slough, OTHER VICES, OTHER CRIMES: AN EVIDENTIARY DILEMMA, 20 KAN.L.REV. 411 (1972) AT 430.

FURTHERMORE, IT IS DIFFICULT TO LIMIT THE PREJUDICIAL EFFECT BY A LIMITING INSTRUCTION TO THE JURY. THE ABILITY OF JURORS TO SEGREGATE EVIDENCE ACCORDING TO PERMISSABLE USES HAS LONG BEEN IN DOUBT.

IT IS GENERALLY RECOGNIZED THAT THERE CAN BE NO COMPLETE ASSURANCE THAT THE JURY EVEN UNDER THE BEST OF INSTRUCTIONS WILL STRICTLY CONFINES THE USE OF THIS KIND OF EVIDENCE TO THE ISSUE OF KNOWLEDGE AND INTENT AND WHOLLY PUT OUT OF THEIR MINDS THE IMPLICATION THAT THE ACCUSED, HAVING COMMITTED THE PRIOR CRIMINAL ACT, PROBABLY COMMITTED THE ONE WITH WHICH HE IS ACTUALLY CHARGED.

UNITED STATES v. BYRD, 352 F.2d 570 (2ND CIR., 1965) AT 574. SEE ALSO NOTE, OTHER CRIMES EVIDENCE AT TRIAL : OF BALANCING AND OTHER MATTERS, 70 YALE L.J. 763 (1961) AT 765, 777.

IT TAKES LITTLE IMAGINATION TO REALIZE THE PREJUDICIAL EFFECT OF REFERENCES TO DEALINGS IN NARCOTICS AND MACHINE GUNS. AT A TIME WHEN DRUG ABUSE AND CIVIL DISORDER ARE CONSTANTLY IN THE HEADLINES, THE PURVEYOR OF NARCOTICS OR MACHINE GUNS IS PICTURED AS A MASS MURDERER. EVIDENCE OF SUCH CRIMES IS HIGHLY PREJUDICIAL.

ON THE OTHER HAND, THE EVIDENCE OF SUCH CRIMES HAD SLIGHT PROBATIVE VALUE AT THE TRIAL. THE COURT ITSELF RULED OUT ANY RELEVANCY AS TO THE DEFENSE OF ENTRAPMENT. (TRIAL, 26) THERE IS NO INDICATION THAT THE TESTIMONY REGARDING MACHINE GUNS WAS NECESSARY TO PROVIDE COMPLETENESS. THE COURT SEEMS

TO HAVE TOTALLY DISREGARDED THIS ASPECT OF RELEVANCY IN ADMITTING SUCH TESTIMONY. THE COURT APPEARS TO HAVE ACCEPTED SUCH TESTIMONY SOLELY FOR THE PURPOSE OF ESTABLISHING INTENT AND NEGATING MISTAKE. (SEE INSTRUCTION OF COURT IN CHARGE AT PP. 205-207) THUS, THE ONLY ISSUE IS WHETHER SUCH EVIDENCE WAS OF SIGNIFICANT PROBATIVE VALUE TO ESTABLISH INTENT SUCH THAT IT WOULD OUTWEIGH ITS OBVIOUS PREJUDICIAL EFFECT.

THE INTENT OF THE APPELLANT WAS NEVER A SUBSTANTIAL ISSUE AT THE TRIAL. THE DEFENDANT WAS NOT A DEALER IN FIREARMS BUT A TAILOR. THE GUNS WERE NOT OPENLY DISPLAYED BUT KEPT IN BOXES AND BAGS. SANCHEZ TESTIFIED THAT THE FIRST GUN HE SAW WAS TAKEN FROM THE BACK OF THE DEFENDANT'S STORE. THERE WERE NUMEROUS MEETINGS AND NEGOTIATIONS. THE SALE OF THE GUNS WAS ALLEGED TO HAVE TAKEN PLACE UNDER FURTIVE CIRCUMSTANCES, IN A CAR PARKED ON A STREET, PURSUANT TO A PRE-ARRANGED MEETING. THUS, THE ACTS SPEAK FOR THEMSELVES. INTENT WAS NEVER IN SUBSTANTIAL ISSUE AND THE GOVERNMENT WAS NOT REQUIRED TO INTRODUCE EVIDENCE OF OTHER CRIMES WHEN OTHER MEANS OF PROOF WERE NOT ONLY AVAILABLE BUT WERE ACTUALLY USED.

THEREFORE, IT IS LIKELY THAT THE VERDICT OF THE JURY MAY HAVE BEEN MADE ON AN IMPROPER BASIS, THE EMOTIONAL FEAR OF ALLOWING A DEALER IN NARCOTICS AND MACHINE GUNS TO BE FREE IN OUR SOCIETY. IN VIEW OF THIS LIKELIHOOD, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR TRIAL WITH INSTRUCTIONS FOR THE EXCLUSION OF ALL REFERENCES TO THE PROPOSED SALE OF NARCOTICS AND MACHINE GUNS.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR TRIAL WITH INSTRUCTIONS TO EXCLUDE ALL REFERENCES TO THE PROPOSED SALE OF NARCOTICS AND MACHINE GUNS.

RESPECTFULLY SUBMITTED,

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